Supreme Court, U.S.
FILED

No. 97-

97 17 04 APR 17 1998

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

April 16, 1998

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

38 pp

QUESTIONS PRESENTED

1. May the Fed.R.Civ.P. 23(a) requirements of commonality and typicality be met in a Rule 23(b)(1)(B) class action, despite this Court's holdings in *Amchem Products v. Windsor*, by reference to a proposed settlement when the claims alleged in the complaint share no common or typical questions of law or fact, and may such a class be certified under Rule 23(a)(4) despite the existence of structural conflicts of interest—including a conflict between presently injured and future claimants, the same conflict condemned by this Court in *Amchem*?

2. Despite the Rules Enabling Act, the Rules of Decision Act, the teachings of *Amchem* and principles of federalism, may a federal court certify a class action under Rule 23(b)(1)(B), premised upon a "limited fund" contrived by a settlement between the parties, to circumvent the Bankruptcy Code and to alter the substantive state law rights of absent class members?

3. Does the Due Process Clause:

(a) permit a federal court to bind absent class members (including residents of the state where the action is brought) to a class action judgment that alters their *in personam* claims for money damages without giving them a chance to opt out of the class?

(b) permit a federal court sitting in diversity to exercise personal jurisdiction over class members asserting *in personam* claims for damages without giving them a chance to opt out, when those class members lack minimum contacts with the forum state?

4. Can class notice sufficient under the Due Process Clause and Rule 23(e) ever be given to a class that includes unknowing, unidentifiable potential future asbestos victims who have no perceptible injury at the time of the class settlement and notice?

5. Does a federal court have power under Article III to adjudicate a "case" brought by plaintiffs who do not in good faith plead claims they intend to litigate, but who bring suit as a friendly joint venture with the defendants solely to provide a jurisdictional hook on which a federal court agrees to hang a tort reform proposal displacing the laws of 50 states?

PARTIES TO THE PROCEEDING

The petitioners in this case are Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers. The defendant is Fibreboard Corporation. The plaintiff class representatives are Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison, James Drake, and Juanita Drake. The insurers who intervened below are Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company. The other parties are Roland Dearborn; Judith Dearborn; Kerwin Butcher, Director, Office of Workers' Compensation Programs, U.S. Department of Labor; James Flanagan; David Middleton; Owens-Illinois, Inc.; Bethlehem Steel Corporation; Kenneth Smith; Plant Insulation Company; and Safety National Casualty Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 11

I. THE JUDGMENT BELOW DEFIES *AMCHEM*'S HOLDINGS ON RULE 23(a). 11

II. THE RULES ENABLING ACT, RULES OF DECISION ACT, RULE 23 AND PRINCIPLES OF FEDERALISM ALL PROHIBIT MANDATORY CLASS TREATMENT OF THE INDIVIDUAL, *IN PERSONAM* CLAIMS FOR DAMAGES ALLEGED IN THIS CASE. 15

III. DUE PROCESS REQUIRES THAT CLASS MEMBERS IN THIS ACTION, WHO PLEADED EXCLUSIVELY PERSONAL INJURY CLAIMS FOR MONETARY DAMAGES, BE GIVEN THE OPPORTUNITY TO EXCLUDE THEMSELVES FROM THE CLASS. 22

IV. THIS COURT RECOGNIZED IN *AMCHEM* THAT THE NOTICE QUESTION PRESENTED HERE IS OF GRAVE IMPORTANCE. 25

V. THIS CLASS ACTION IS NOT A JUSTICIABLE CONTROVERSY UNDER ARTICLE III. 25

A. This "class action" is a feigned proceeding. 26

B. The "exposure-only" class members have no injury in fact. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Adams v. Robertson, 117 S.Ct. 1028 (1997) (per curiam) .. 16, 22

Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997) ..... *passim*

Arizonans for Official English v. Arizona, 117 S.Ct. 1055 (1997) 27, 28

Armstrong World Indus. v. Aetna Cas. & Sur. Co., 45 Cal.App. 4th 1, 52 Cal.Rptr. 2d 690 (Cal.Ct.App. 1996), *review denied* (Aug. 21, 1996). 2

Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. dism'd as improv. granted*, 511 U.S. 117 (1994) 22

City of Dawson v. Columbia Ave. Saving Fund, 197 U.S. 178 (1905) 27

Georgine v. Amchem Products, 157 F.R.D. 246 (E.D.Pa. 1994), *vacated and remanded*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 117 S.Ct. 2231 (1997) 7

Georgine v. Amchem Products, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 117 S.Ct. 2231 (1997) 7, 8

In re Joint E. & S. Dist. Asbestos Litig. (Findley I), 982 F.2d 721 (2d Cir. 1992) 13, 23, 24

In re Joint E. & S. Dist. Asbestos Litig. (Findley III), 78 F.3d 764 (2d Cir. 1996) 23

In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) ... 24

TABLE OF AUTHORITIES — Cont'd

Page

International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991) 29

Katchen v. Landy, 382 U.S. 323 (1966) 24

Keene Corp. v. Fiorelli, 14 F.3d 726 (2d Cir. 1993) 19, 20

Lewis v. Casey, 116 S.Ct. 2174 (1996). 29

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 28

Matsushita Elec. Indus. Co. v. Epstein, 116 S.Ct. 873 (1996) 12

Mistretta v. United States, 488 U.S. 361 (1989) 21

National Super Spuds v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir. 1981) 12

Ortiz v. Fibreboard, 117 S.Ct. 2503 (1997) 1

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 9, 24

Richards v. Jefferson County, 116 S.Ct. 1761 (1996) 24

Spencer v. Kemna, 118 S.Ct. 978 (1998) 29

Steel Company v. Citizens for a Better Environment, 118 S.Ct. 1003 (1998) 27, 29

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (per curiam) 22

United States v. Johnson, 319 U.S. 302 (1943) 28

Whitmore v. Arkansas, 495 U.S. 149 (1990) 28

TABLE OF AUTHORITIES — Cont'd

Constitutional, Statutory and Rules Provisions **Page**

U.S. Const., Art. III ..... *passim*
Amend. V, Due Process Clause 22, 23, 24

11 U.S.C. § 305(a)(1) 20
§ 524(g)&(h) 21
§ 1126. 20

28 U.S.C. § 1254(1) 1
§ 1652 (Rules of Decision Act) 15, 17, 21
§ 2072 (Rules Enabling Act) 9, 11, 15, 17, 21

Fed.R.Civ.P. 23(a) ..... *passim*
23(a)(2) 7
23(a)(3) 7
23(a)(4) 8, 10, 13, 14
23(b)(1)(B) ..... *passim*
23(b)(3) ..... *passim*
23(c)(2) 25
23(e) 25

Miscellaneous

Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS (3d ed. 1992) 7

H.R.Rep. No. 595, 95th Cong., 1st Sess. (1977). 20

Charles Alan Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE (Supp. 1995) 12

OPINIONS BELOW

The opinion of the court of appeals after remand (Appendix A) is reported at 134 F.3d 668. The order of this Court vacating the original judgment of the court of appeals (App. B) is reported at 117 S.Ct. 2503. The original opinion of the court of appeals (App. C) is reported at 90 F.3d 963. The opinion of the court of appeals denying rehearing en banc (App. M) is reported at 101 F.3d 368. The memorandum opinion of the district court approving the class settlement (App. E) is reported at 162 F.R.D. 505. The district court's findings of fact (App. F) and conclusions of law (App. G) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1998. App. 3a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Pertinent portions of Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment, the Rules Enabling Act, 28 U.S.C. § 2072, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed.R.Civ.P. 23 are set forth in Appendix O.

STATEMENT OF THE CASE

Some people just can't take a hint. Last June, in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997), this Court decertified a nationwide asbestos damages class action consisting entirely of potential future asbestos plaintiffs, and thereby rejected the attempt at judicial legislation embodied in that class action, by holding that the class failed the requirements of both Fed.R.Civ.P. 23(a) and 23(b)(3). The following Monday, this Court granted certiorari in this case, *Ortiz v. Fibreboard*, 117 S.Ct. 2503 (1997), and vacated the Fifth Circuit's decision certifying, under Fed.R.Civ.P. 23(b)(1)(B), a nationwide asbestos damages class action consisting entirely of potential future asbestos plaintiffs. This Court directed the Fifth Circuit to reconsider the case in light of the decision in *Amchem*. App. 36a. Instead, the two-member panel majority below simply issued an unsigned, conclusory, five-paragraph opinion reinstating its prior decision. Making no effort to

reconcile the class certification in this case with either the holdings or the principles of *Amchem*, the Fifth Circuit announced that a future-claimant, settlement-only damages class that could not be certified under Fed.R.Civ.P. 23(b)(3) is perfectly appropriate if the parties, coached by the district court itself, proceed under the guise of Rule 23(b)(1)(B).

The Fifth Circuit has effectively issued an invitation to mass tort defendants nationwide to resolve all their future liabilities in one stroke by filing a "limited fund" settlement-only damages class action in the courts of that circuit—where tort reform by judicial fiat persists despite this Court's resounding condemnation of the practice in *Amchem*. This Court should revoke the Fifth Circuit's invitation and grant certiorari to clarify that federal courts may not circumvent Congress's Bankruptcy Code and the Rules Enabling Act by invoking Rule 23(b)(1)(B) to alter the substantive state-law rights of absent class members simply by asserting a contrived "limited fund"—a fund limited only by what the defendant, solvent but fearing a potential future risk of insolvency, is willing to pay now to resolve its entire future stream of tort liabilities.[1]

1. Background and Settlement Negotiations. Fibreboard's corporate predecessors manufactured and distributed asbestos-containing products for fifty years. By 1988, Fibreboard had exhausted its insurance against asbestos lawsuits with the exception of contested policies issued by Continental Casualty Co. ("CNA") and Pacific Indemnity ("Pacific")("the insurers") covering the years 1957 through 1959. Although both CNA and Pacific disputed coverage for Fibreboard's asbestos liabilities, their potential exposure was unlimited because none of the contested policies had an aggregate limit on coverage. The coverage dispute was litigated by Fibreboard and the insurers in the California state courts.[2]

---

[1] As Judge Smith noted in dissent, Fibreboard is "a solvent, ongoing concern" with "solvent insurers," and was in fact acquired in 1997, subsequent to the Fifth Circuit's original decision, by Owens-Corning in a tender offer for $515 million cash, which could expand enormously the assets available to pay Fibreboard's future asbestos liabilities. App. 10a n.11; 13a-14a.

[2] In 1996 the California courts finally resolved the bulk of the contested coverage issues in favor of Fibreboard. *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal.App. 4th 1, 52 Cal.Rptr. 2d 690 (Cal.Ct.App. 1996), *review denied* (Aug. 21, 1996). Since that decision, the Fifth Circuit has mooted the coverage litigation altogether by affirming the district court's approval of the "Trilateral Settlement Agreement" in the case of *Continental Casualty Co. v. Rudd*. App. 93a-98a. As described below, the Trilateral Agreement compromises Fibreboard's coverage dispute independently of the class settlement in this case.

This asbestos class action began with that insurance coverage dispute. No plaintiff who had been injured by asbestos came forward to file a class action complaint. Instead, the case began when Fibreboard, possessing (a) $225 million in net worth which it wished to protect and (b) the possibility of unlimited insurance coverage under the disputed policies, established a "corporate goal [of] resolv[ing] its asbestos liabilities within its available insurance resources." App. 577a. In 1991, Fibreboard sought out several nationally prominent asbestos plaintiffs' attorneys (hereafter "class counsel") and invited them to negotiate a global settlement of Fibreboard's total potential future asbestos liabilities.

In March 1993, CNA began participating in these negotiations; in August 1993, Pacific came to the negotiating table. On August 9, 1993, the Hon. Robert M. Parker, then Chief Judge of the Eastern District of Texas,[3] issued an order authorizing class counsel to "negotiate [with Fibreboard] the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." App. 45a. *Thus, before a lawsuit was even filed, Judge Parker had appointed class counsel and had directed them to negotiate a class action settlement with the defendant, ostensibly on behalf of unknown representative plaintiffs to be named later*. Judge Parker orchestrated the settlement negotiations, and the critical meetings that produced the final agreement were held at Judge Parker's home. App. 45a-47a. On August 27, 1993, Fibreboard, the insurers and class counsel announced their proposed Global Settlement of all future asbestos claims, which required the insurers to pay $1.525 billion into a settlement trust. App. 46a-47a, 49a.

That same day, the insurers and Fibreboard independently agreed to resolve their insurance coverage dispute with respect to *all*

---

[3] After the class action complaint was filed, Judge Parker became a judge of the Fifth Circuit; he continued to sit as district judge in this case by designation.

claims, both present and future, *whether or not the Global Settlement of future asbestos claims received court approval*. App. 46a-47a. This independent Trilateral Agreement, formalized on October 12, 1993, provides that, if the Global Settlement is *not* approved, the insurers will pay Fibreboard $2 billion—half a billion *more* than the insurers' payment to the trust under the Global Settlement—which Fibreboard can then use, in addition to its own assets, to resolve pending and future claims as they are filed in the years to come. Unlike the Global Settlement, the Trilateral Agreement in no way limits the legal rights of asbestos victims with respect to their claims against Fibreboard. App. 51a. The Trilateral Agreement guarantees that Fibreboard will have ample insurance coverage with which to pay future asbestos claims.[4]

On September 9, 1993, the settling parties filed the complaint in *Ahearn v. Fibreboard Corp.*, No. 6:93cv526 (E.D. Tex. 1993), *the class action "lawsuit" they had "settled" two weeks earlier*. App. 552a. Invoking the court's diversity jurisdiction under 28 U.S.C. § 1332 (App. 553a), the complaint alleged claims on behalf of all those who had been exposed to asbestos for which Fibreboard may be liable, but who had not filed, or had dismissed without prejudice, any asbestos-related lawsuit against Fibreboard prior to August 27, 1993, and all past, present, and future spouses, parents, children, and other relatives of such individuals. App. 555a-556a. While the complaint sought damages for the proposed class only against Fibreboard, CNA and Pacific immediately intervened as defendants. App. 567a.

At the same time they filed their complaint, class counsel and the insurers—pursuant to the district court's prior instructions—jointly moved for certification, under Fed.R.Civ.P. 23(b)(1)(B), of a mandatory, nationwide class of *all* potential future asbestos claimants against Fibreboard—including those who

---

[4] The insurers filed suit against a defendant class of "future" asbestos claimants (*Continental Casualty Co. v. Rudd*), seeking a declaration that the Trilateral Agreement was fair and reasonable with respect to the defendant class members, who are the potential third-party beneficiaries of the policies. The district court approved the Trilateral Agreement; petitioners neither objected to that agreement nor appealed from the district court's judgment. Although the Fifth Circuit consolidated *Rudd* with this case, following issuance of the panel's decision in the two cases *Rudd* was severed. No party sought rehearing of the *Rudd* decision and the *Rudd* judgment is now final.

currently had no actionable asbestos-related condition. In other words, future asbestos plaintiffs were included in the proposed class even if they had not yet sustained physical injury, had no accrued claims, and were protected by state laws from the running of statutes of limitations on any claims they might develop in the future, while currently injured asbestos plaintiffs who had already sued were simply defined as being outside the class and were thereby *automatically* "opted out" of this supposedly non-opt-out class.

For the few class members who had already developed an asbestos-related disease, the complaint sought damages for personal injuries. For all other class members—the overwhelming majority—who had been exposed to asbestos but had not yet suffered any discernible physical injury, the complaint purported to seek damages for their *risk* of contracting such diseases in the future, for emotional distress arising from the *fear* of contracting future diseases, and for medical monitoring to *detect* those diseases. App. 561a.

On September 9, 1993, the same day that the complaint and joint motion for class certification were filed, Judge Parker provisionally certified the class "for settlement purposes only" under the so-called "limited fund" provision of Fed.R.Civ.P. 23(b)(1)(B). App. 543a. The district court appointed as class counsel the four attorneys who had negotiated the settlement announced on August 27. App. 48a. Three months later, on December 23, 1993, the parties filed the formal settlement document. App. 48a-49a.

2. The Terms of the Global Class Settlement. Although the class complaint of course alleged no unaccrued claims for future personal injuries, *the central feature of the Global Settlement is that all class members release those "claims."* The settlement provides that CNA and Pacific will contribute a total of $1.525 billion to a Trust to be established on behalf of all class members, and that Fibreboard will contribute an additional $10 million (out of its net worth of at least $225 million). In return, Fibreboard is forever released from any lawsuit that class members might bring in the future, and the insurers are released from any responsibility for defending against or indemnifying such claims. App. 49a-50a.

This release of unripe future claims provides the means for Fibreboard to achieve its "corporate goal" (App. 577a) of resolving its asbestos liabilities within the limits of its available insurance. Because the class was certified as a mandatory class under Rule

23(b)(1)(B), class members were given no opportunity to exclude themselves from this compulsory release of their as-yet unaccrued claims. The Global Settlement extinguishes class members' claims even if they received no notice of the settlement and hence were unable to object to it in a timely manner, even if they were unaware of their own exposure to asbestos or of the past exposure of whoever would someday become their parent or spouse, and even if they were not among the tiny fraction of the class that had then suffered any injury.

In return for this forced release of all future, unaccrued claims, class members are allowed the opportunity, if and when they develop an asbestos-related disease, to present a claim through the Alternative Dispute Resolution ("ADR") provisions of the Trust Distribution Process. App. 583a. Once a class member submits a claim and furnishes all necessary information to support that claim, the Trust will make an offer of settlement after completing an initial evaluation of the claim. App. 584a. If the class member accepts such an offer, she will be paid in three annual installments—40 percent in the first fiscal year after the offer has been accepted, and 30 percent in each of the following two years. App. 605a. If the class member rejects the offer, she may then proceed to mediation, non-binding arbitration, and finally a mandatory settlement conference. App. 584a.

Only after enduring all of these delays may a class member finally file a lawsuit against the Trust—and, even then, the Global Settlement imposes significant limitations on that lawsuit, saddling it with what the Fifth Circuit called its "spendthrift provisions." App. 49a. Class members cannot recover punitive damages, pre-judgment interest, or post-judgment interest. App. 584a. They are limited to a maximum of $500,000 in compensatory damages, no matter what damages are assessed by the jury. App. 607a. Even in jurisdictions where the governing substantive law provides for joint and several liability, class members are limited to the portion of liability assigned to the Trust, which stands in the shoes of Fibreboard for purposes of trial. App. 584a. The settlement penalizes any class member who ultimately prevails in court by spreading payment of the judgment in installments over a period of five to ten years, without interest (as compared to the three-year payout for claims resolved by arbitration or settlement before resort to the judicial system). App. 605a-606a.

3. District Court Proceedings. The five petitioners are all members of the plaintiff class who intervened in the district court for purposes of objecting to the proposed Global Settlement. The district court held a hearing regarding the fairness of the settlement but did not conduct a separate hearing on class certification.

On July 27, 1995, the district court reaffirmed its "preliminary" certification of the class pursuant to Rule 23(b)(1)(B). The court held that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation—which of course apply even in 23(b)(1)(B) classes—were met because "all class members share ... common interests [in] maximizing the total settlement [and in] adopting procedures that provide for payments to claimants in an equitable manner." App. 226a-227a. The district court predicated this certification ruling on *Georgine v. Amchem Products*, 157 F.R.D. 246 (E.D.Pa. 1994) (see App. 225a, 228a), and Alba Conte & Herbert Newberg, 2 NEWBERG ON CLASS ACTIONS § 11.28 (3d ed. 1992) (see App. 223a, 225a, 226a). Both of these authorities—and the rule for which the district court cited them—were subsequently repudiated by this Court in *Amchem Products v. Windsor*, 117 S.Ct. 2231, 2247, 2249-50 & n.18 (1997). The district court approved the settlement and awarded the class counsel chosen by Fibreboard a total of $43.7 million in fees. App. 541a-542a.

4. The Fifth Circuit's Initial Decision. A divided panel of the Fifth Circuit affirmed over the outraged dissent of Circuit Judge Jerry Smith. The majority expressly refused to follow the Third Circuit's decision in *Georgine v. Amchem Products,* 83 F.3d 610 (1996), which was subsequently affirmed by this Court in *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). App. 55a-56a. Instead, the panel held that a settlement reduces the need to measure a class against Rule 23's requirements (App. 55a-56a) and that the "questions of law or fact common to the class" under Rule 23(a)(2) may be "derived from the settlement rather than from the [plaintiffs'] complaint." App. 56a-57a. The panel further held that Rule 23(a)(3)'s requirement that the "claims or defenses of the representative parties" be "typical" of the class did not mandate reference to the claims actually pleaded in the class complaint, but that "typical" interests, such as the class members' "interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation" (App. 57a), could instead arise from the settlement itself.

Petitioners argued, and the dissent below agreed, that the class failed the Rule 23(a)(4) requirement of adequate representation because the class was divided by internal conflicts. Most salient was the very same conflict on which the Third Circuit focused in *Amchem*: for the currently injured who possessed extant asbestos claims, the critical goal was to maximize immediate payment of both compensatory and punitive damages; for the exposure-only class members who have no current claim, the critical goals were to cap compensatory damages, to slow payouts, and to eliminate interest payments and punitive damages in order to preserve as much of the fund for the future as possible. App. 145a-148a (citing *Georgine v. Amchem Products*, 83 F.3d at 630-31).

The petitioners (and the dissent) also identified a conflict between those class members injured before 1959 (when Fibreboard had unlimited coverage under its liability insurance policies with CNA and Pacific) and those injured after 1959 (for which there was no remaining insurance and victims could recover only against Fibreboard's own assets). Prior to the settlement, the asbestos claims of pre-1959 victims were enormously more valuable than those of the post-1959 victims. App. 148a-150a. Yet, without separate representation for these antagonistic groups, the settlement sacrificed the fortunate status of pre-1959 claimants to benefit the class as a whole. *Id.*

Finally, the petitioners argued, and the dissent agreed, that class counsel labored under a fatal conflict of interest because, at the same time they were negotiating on behalf of a class of future claimants, they also represented individual asbestos claimants with pre-existing lawsuits, and the interests of those two groups inherently differ over how any settlement should allocate and limit recovery. While the class negotiations were underway, class counsel settled their entire outstanding inventory of thousands of pre-existing asbestos cases against Fibreboard for higher-than-average amounts, *contingent on the approval of a global settlement—on any terms—of all future claims against Fibreboard.* App. 142a-143a. Class counsel thus excluded their entire pre-existing client roster from a supposedly non-opt-out 23(b)(1)(B) class. App. 117a.

The panel majority did not really contest the existence of these conflicts within the class; it simply held that they were

"overwhelmed" by the common interest of all class members in obtaining a settlement. App. 67a-72a.

Despite the fact that the class complaint pleaded, and the settlement released, individual personal injury damages claims against Fibreboard rather than equitable or "*in rem*" claims against a trust or a *res*, the Fifth Circuit upheld the certification of a mandatory class under Rule 23(b)(1)(B) because the mere *possibility* that Fibreboard might *someday* become insolvent created a "'risk' that separate adjudications 'as a practical matter' would 'substantially impair or impede' the interests of the class." App. 78a. The court of appeals held that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), does not require that class members be afforded an opportunity to opt out of the class because that same theoretical risk of future insolvency transformed the class action from one seeking classwide disposition of individual tort claims for *in personam* damages into a "unitary," "*in rem*" claim for equitable allocation of a self-imposed limited fund. App. 82a-84a.[5] Petitioners argued that the Rules Enabling Act, 28 U.S.C. § 2072, and related principles of federalism prohibit the federal judiciary from using Rule 23(b)(1)(B) to effect such a *pro rata* adjustment of the class members' substantive state law rights against a defendant that is not in bankruptcy or receivership. But the Fifth Circuit held that its creative use of Rule 23(b)(1)(B) created "a superior alternative to the Bankruptcy Code" (App. 78a) and that it was therefore empowered to "circumvent[]" "the terms and principles of the Bankruptcy Code." App. 78a.

Finally, the court of appeals brushed aside petitioners' arguments that the district court lacked subject-matter jurisdiction to approve this collusive settlement of unaccrued, future damages claims (App. 86a-88a), and that adequate notice can never be given to legions of uninjured class members who may not even know of their exposure to asbestos, let alone be able intelligently to evaluate a proposed settlement so as to decide whether to object. These were

---

[5] The court also rejected petitioners' narrower contention that due process at least requires that class members who lack minimum contacts with the forum state of Texas be given an opportunity to opt out, so that their failure to do so might be construed as consent to the court's exercise of personal jurisdiction. App. 81a-84a. *See Shutts*, 472 U.S. at 812.

defects that the dissent deemed insurmountable. App. 113a-116a; 154a-181a.

In dissent, Judge Smith castigated the panel majority for "legislat[ing] a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit." App. 104a. Indeed, Judge Smith observed, "there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they had already settled it." App. 104a. This settlement "is purely legislative: Class members' causes of actions are repealed in favor of the equivalent of a workers' compensation regime." App. 105a.

5. The Fifth Circuit Decision After Remand. This Court vacated the Fifth Circuit's decision and remanded the case for reconsideration in light of *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). App. 36a. Over a strenuous dissent, the same panel majority then issued an unsigned opinion just five paragraphs in length, reinstating its prior decision. App. 1a. The court of appeals deemed *Amchem* inapposite because it concerned a Rule 23(b)(3) class, whereas the class here was certified under Rule 23(b)(1)(B). App. 2a.

Amchem, however, had expressly repudiated the panel majority's prior rulings that "settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements" and that, "'in the settlement class context, common issues arise from the settlement itself.'" 117 S.Ct. at 2247 (quoting the Fifth Circuit, App. 56a). The Fifth Circuit nevertheless reinstated its decision, based on those repudiated rulings, and again predicated certification on the "equities" of the settlement. App. 2a-3a.

Amchem held that the "benefit asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent" to the certification inquiry under Rule 23(a). 117 S.Ct. at 2249. The Fifth Circuit nevertheless held that the class met the commonality and typicality requirements of Rule 23(a) because the class was united by a "common interest" in "seeking equitable distribution of compensation" under the settlement's dispute resolution process. App. 3a.

Amchem held that a class containing both presently injured asbestos victims and potential future plaintiffs who have merely been exposed to asbestos cannot meet the standard of Rule 23(a)(4)

without the "structural assurance of fair and adequate representation" provided by separate subclass representatives with their own attorneys. 117 S.Ct. at 2251. The Fifth Circuit panel nevertheless upheld certification of a class plagued by the identical conflict here, holding that the existence of such conflict-creating competition for "larger and earlier shares of available money" is "precisely" what makes class certification under Rule 23(b)(1)(B) proper. App. 3a.

In *Amchem* this Court noted its "grav[e]" concern "whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions" who have "no perceptible asbestos-related disease at the time of the settlement" and who "may not even know of their exposure." 117 S.Ct. at 2252 (citing Judge Smith's dissenting opinion below, App. 113a-118a). The Fifth Circuit panel majority simply ignored this question on remand, but necessarily resolved it by implicitly holding notice to be sufficient.

In *Amchem*, this Court began and ended its analysis with the reminder that Rule 23 "must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" 117 S.Ct. at 2244; *see also id.* at 2248, 2252. The Fifth Circuit panel did not deign to discuss these constraints on remand. The court simply reinstated its prior judgment expanding the Rule 23(b)(1)(B) "limited fund" class action category for the avowed purpose of "circumvent[ing]" the Bankruptcy Code (App. 78a) and "effect[ing] a pro rata reduction" of the class members' substantive state-law tort claims. App.82a. Judge Smith filed a detailed dissent, reiterating his prior criticisms and denouncing the panel majority for flouting this Court's decision in *Amchem*. App. 3a-35a.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW DEFIES *AMCHEM*'S HOLDINGS ON RULE 23(a).

This Court has *already* rejected the Fifth Circuit's application of Rule 23(a) to this settlement class action. In canvassing the differing approaches of the lower courts, the *Amchem* opinion cited the Fifth Circuit's prior opinion in this very case as holding that "settlement obviates or reduces the need to measure a proposed class against the

enumerated Rule 23 requirements." 117 S.Ct. at 2247. That holding was in turn expressly repudiated by this Court: Rule 23(a)'s specifications "demand undiluted, even heightened, attention in the settlement context." 117 S.Ct. at 2248 & n. 16. Because both the district court and the court of appeals below applied this now-rejected reduced standard for class certification, all of their findings and rulings on Rule 23(a)'s requirements are irretrievably tainted by the application of an erroneous legal standard. Yet on remand the Fifth Circuit simply reinstated its prior Rule 23(a) rulings and again deferred to the district court's tainted "conclusions" that Rule 23(a)'s requirements had been met. App. 2a. Surely that will not do.

Amchem also observed that the Fifth Circuit's prior opinion had held that, "'in the settlement class context,'" the issues that bind a class together under Rule 23(a) "'arise from settlement itself.'" 117 S.Ct. at 2247 (quoting the Fifth Circuit at App. 56a). *See also* App. 56a-58a (same). That holding was likewise squarely rejected by this Court in *Amchem*. The questions that must be "common" to and "typical" of the class under Rule 23(a) are the "legal or factual questions that qualify each class member's case as a genuine controversy, questions that *preexist* any settlement." 117 S.Ct. at 2249 & n.18 (emphasis added).[6]

Although the dissenting opinion below grasped and applied this holding on remand (App. 29a, 34a), the panel majority did not. The Fifth Circuit refused to assess class certification in terms of the legal or factual questions in the complaint—the kinds of questions "'that

---

[6] The authority of class plaintiffs to represent and bind absent class members under Rule 23 is limited by the scope of the class complaint, which describes the typical claims held in common by the class. Class representatives can release only those claims pleaded in the complaint or claims arising from the very same factual predicate as those pleaded in the complaint. *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 18-19 & n. 7 (2d Cir 1981) (Friendly, J.). *Matsushita Electric Industrial Co. v. Epstein*, 116 S.Ct. 873, 878-79, 883 (1996), is entirely consistent, because there both the state-law claims and the exclusively federal claims arose from the identical factual predicate involving the same transaction. Since the class plaintiffs here do not, by definition, currently possess actionable "future" claims for asbestos personal injury or wrongful death or lost consortium, they do not plead such claims and cannot release or settle such claims on behalf of the class. 7B Charles Alan Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 46-47 (Supp. 1995).

can be raised in courts of law as part of an actual or impending lawsuit,'" 117 S.Ct. at 2249 n.18—and instead purported to find Rule 23(a) commonality and typicality in the class members' supposed "common interest" in "seeking equitable distribution of compensation" under the settlement. App. 3a. The court below thus repeated the very error that this Court's *Amchem* decision had just condemned. As Judge Smith explained, *Amchem* held that a common interest in a fair compromise is not enough. App. 19a-20a, 29a, 31a & n.31. Indeed, Rule 23(a)'s safeguards "serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

Amchem also held that the Rule 23(a)(4) requirement of adequate representation cannot be met where a mass tort class is riven by a conflict between "currently injured" and "exposure-only" potential future plaintiffs. 117 S.Ct. at 2251. The goal of the largest possible immediate payouts for the former class "tugs against the interest of exposure-only plaintiffs in ensuring ample" settlement funds for the future. *Id.* Rule 23 mandates "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.*

> Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. . . . "The class representatives may well have thought that the settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups."

117 S.Ct. at 2251 (quoting *In re Joint E. & S. Dist. Asbestos Litigation (Findley I)*, 982 F.2d 721, 742-43 (2d Cir. 1992)).

Precisely the same conflict exists in this settlement class action, and no subclasses with separate representation were created to cure it. App. 22a-24a (Smith, J., dissenting). If anything, as this Court itself observed in *Amchem*, 117 S.Ct. at 2251, the conflict between present and future tort claimants is exacerbated when the settlement

class is treated, as it was here, as "a 'limited fund' case certified under Rule 23(b)(1)(B)." For this settlement's "spendthrift provisions" make crucial decisions about limiting relief for present victims in order to preserve funds for future claimants. App. 26a-27a (Smith, J., dissenting).[7]

The court below *did not really deny the existence of these conflicts* in its original opinion (App. 67a-72a), nor did it try to do so upon remand. App. 3a. Instead, the court of appeals simply characterized this conflict between present and future plaintiffs as "competition for earlier and larger shares of available money," and then held that this intra-class conflict—far from being a problem—is "precisely the reason" for a Rule 23(b)(1)(B) class, where such "conflict" can be "controlled for the benefit of all members of the class" by the district court. App. 3a. The very intra-class conflicts which this Court held to be fatal in *Amchem* were deemed by the Fifth Circuit to be "outweighed" (App. 69a) by each class member's "common interest" in securing, through the settlement, access to an equitable distribution of Fibreboard's available insurance coverage. App. 3a.

This same argument was pressed by the dissent in *Amchem*, which agreed that the conflict between future and presently injured class members was a "serious problem," but insisted that it is precisely this "'real and present danger that the available assets will be exhausted'" before future victims become sick and can recover that makes a class action settlement appropriate, because the district court can supposedly "ensur[e] that the interests of no class members are sacrificed." 117 at 2256 (Breyer, J., dissenting in part). This Court squarely rejected that position: Rule 23(a)(4) mandates "*structural assurance*" of fair representation for diverse groups and

---

[7] Structurally inadequate representation is also evident in the way that the settlement "forced the pre-1959 claimants to give up something of value that is legally their due—their cause of action against an insured Fibreboard—in order to benefit a group of claimants to whom they owe nothing." App. 25a.

There was also a conflict of interest on the part of class counsel when they negotiated this supposedly mandatory class action while simultaneously settling thousands of cases for their own clients on separate terms *outside that global settlement*. App. 117a-118a, 142a-145a (Smith, J., dissenting). As Justice Ginsberg noted during the argument in *Adams v. Robertson*, this would appear to create a conflict of interest for class counsel. Tr.Oral Arg. at 36-37.

individuals. 117 S.Ct. at 2251 (emphasis added). The "class certification inquiry does not examine the merits of the tradeoffs created by a settlement, *but examines whether class representatives and class counsel had authority to trade at all*." App. 19a (Smith, J., dissenting) (emphasis added). The Fifth Circuit's astonishing refusal to apply the rules of law laid down by this Court justifies issuance of a writ of certiorari — indeed, it warrants summary reversal.

II. THE RULES ENABLING ACT, RULES OF DECISION ACT, RULE 23 AND PRINCIPLES OF FEDERALISM ALL PROHIBIT MANDATORY CLASS TREATMENT OF THE INDIVIDUAL, *IN PERSONAM* CLAIMS FOR DAMAGES ALLEGED IN THIS CASE.

A possible reason for plenary consideration rather than summary reversal under *Amchem* is that the court below committed even more grievous sins against the structure of our federal system and the separation of powers—sins that this case presents an ideal vehicle to examine.

The Fifth Circuit's original decision certifying this case as a mandatory class under Rule 23(b)(1)(B) was vacated by this Court and remanded with directions to reconsider certification in light of the opinion in *Amchem*, which stressed that Rule 23's requirements "must be interpreted in keeping with ... the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072(b)." 117 S.Ct. at 2244 (the Act is set forth at App. 550a). The court below simply ignored this instruction: without much fuss and without any mention of the Rules Enabling Act, the panel majority reaffirmed the district court's 23(b)(1)(B) certification. App. 2a. As Judge Smith explained in dissent, "the court," contrary to the Rules Enabling Act, "now takes away state law rights of those who have been damaged in tort and allows the asbestos victims only a pro-rata share in an artificially limited settlement fund." App. 13a.

Pursuant to the Rules of Decision Act, the substantive rights of class members in this diversity action are defined by "[t]he laws of the several states." 28 U.S.C. § 1652 (App. 551a). The class complaint pleads no *in rem* claims and seeks no equitable relief. Even the court of appeals and the district court below agreed that the substantive rights at issue here are plaintiff class members' *state law*

"damages" claims for "personal injuries." App. 58a, 76a. *See also id.* at 156a & nn. 55-56 (Smith, J., dissenting). As Judge Smith explained,

> It is fundamental that an injured party has an *in personam* claim against the person responsible for his injury. Such a claim is not limited by the amount of insurance carried by a defendant, nor by its liquid assets or net worth. A final judgment against the defendant becomes much like any other debt, able to be collected from any of a defaulting debtor's existing or after acquired assets.

App. 10a. Thus, if a class member individually prosecuted her personal injury claim against Fibreboard and secured a final judgment, state law provides that the judgment would be immediately enforceable against the company *in full*, and no other class member could interfere with her collection of that judgment unless and until Fibreboard declared bankruptcy or was subjected to a receivership. When counsel for the settling parties in *Adams v. Robertson,* 117 S.Ct. 1028 (1997) (per curiam), a mandatory class action tort case that reached this Court last Term, complained that this "race to the courthouse" regime allowed the "lucky few," who got injured and were first to sue, to recover while "the vast majority" of later claimants "would be left with nothing," Justice Scalia remarked: "So what? That often happens. That most often happened under common law." Trans. of Oral Argument in No. 95-1873 at 43.

It is undisputed that the settlement imposed on this mandatory class drastically curtails the plaintiffs' substantive state law rights. In the Fifth Circuit's words, the class members' *in personam* claims against Fibreboard "will be directed to the trust for processing and payment according to the procedures provided in the trust distribution process." App. 49a. Under that settlement, compensatory damages are capped at $500,000 (even though lung cancer and other asbestos claims regularly result in verdicts in the millions); punitive damages are banned (even though they are available under the law of nearly every state); and no pre- or post-judgment interest may be awarded (even though interest is authorized by law in many jurisdictions). App. 24a (Smith, J., dissenting). Thus, as the Fifth Circuit forthrightly conceded, it is using a Rule 23(b)(1)(B) mandatory class in order "to effect a pro-rata reduction of all claims." App. 82a. By

imposing this mandatory class settlement, the courts below abridged the *substantive* rights afforded millions of class members by the tort laws of *fifty states* and substituted a "one-size-fits-all" asbestos claims regime that has not been enacted by Congress or by the legislature of any state.

This directly violates the Rules Enabling Act *and* the Rules of Decision Act. And, by utilizing a procedural rule to abridge and modify the substantive rights enjoyed by class members under their respective states' laws, the courts below have simply ignored the constitutional principles of separation of powers and federalism that undergird those statutes and that are essential to the integrity of the federal judicial system. Rule 23(b)(3) provides a mechanism for aggregating *in personam* claims if the stringent requirements of the rule are met. *See Amchem.* But because the possibility of mass opt-outs from the class would have spoiled the insurers' and Fibreboard's attempts to rid themselves of all future asbestos liability if they had sought certification under Rule 23(b)(3) (App. 43a-48a), the settling parties and the courts below have tried to shoehorn these *in personam* damages claims into a Rule 23(b)(1)(B) class. Yet as this Court recognized (in a prior case in which it was unable to reach the merits), there is "a substantial possibility" that, "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under" Rule 23(b)(1), "which do[es] not." *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121 (1994).

The fiction invoked by the courts below is that the plaintiffs' personal injury tort claims are in fact *in rem* claims "made by numerous persons against a fund insufficient to satisfy all claims." Advisory Committee Note to 1966 Amendment to Rule 23(b)(1)(B).[8] But there is no *res*, no fund here—limited or otherwise—and pretending there is cannot make it so:

---

[8] In approving the class certification under Rule 23(b)(1)(B), the Fifth Circuit panel majority deferred to the district court's conclusory "finding" that "separate actions by members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." App. 2a. But Judge Smith is surely correct that "the enunciation of these magic words cannot insulate the underlying legal determination from review." App. 9a (Smith, J., dissenting).

> The insurance proceeds are not common or limited, but are simply all that the defendants are willing to provide to the settlement. A settlement offer is far from a "fixed asset ... in which all class members have a preexisting interest." ... [And] the plaintiffs do not have a preexisting interest in Fibreboard's assets; *the purpose of the suit is to establish those rights and not to divide preexisting rights.*

App.121a n.17 (Smith, J., dissenting)(emphasis added). When the district court conceded that the class "'claims were, *prior to settlement, in personam* in character,'" it was implying that, in its view, "the settlement transformed the claims into something other than *in personam* claims." App. 156a n.56 (Smith, J., dissenting)(quoting the district court at App. 518a) (emphasis added).

But the class members' claims are not pleaded against a bond, a ship involved in a maritime accident, a trust fund, an insurance policy, or any other specific property. Nor are the class members' claims asserted against a defendant in receivership or bankruptcy. The substantive rights of each member of this class are independent of every other's. Yet the decision below strips class members of these enforceable state law rights and replaces them with a privately negotiated and judicially endorsed "right" to seek a pro-rata share of a settlement fund limited solely by the negotiating postures of Fibreboard and its insurers. This fund is "limited" only in the most contrived and tautological sense:

> To be sure, the *settlement* does establish a limited fund: a res from which payment for all claims must be distributed. Indeed, for Fibreboard, the entire point of this settlement was to obtain a limit on liability that theretofore had been, quite literally, limitless. But that does not transform the plaintiffs' *in personam* claims against Fibreboard into in rem claims against the newly-established fund.

App. 11a (Smith, J., dissenting). Even if the mounting pressure of asbestos claims might someday have driven Fibreboard into insolvency, "the specter of eventual bankruptcy does not now render this ongoing concern a 'limited fund.'" *Id.* Until the "time of a bankruptcy discharge, tort creditors have a legally unlimited font of money from which they may demand their due." *Id.*

This settlement fund is therefore "limited" only in the sense that literally *every* settlement is limited. As Justice Souter observed during the *Amchem* oral argument, there is always "a kind of limited fund unless you assume that the defendants in these cases are simply standing in court saying, 'we'll pay anything they want—the sky is the limit.'" Tr.Oral Arg. in No. 96-270 at 14. If that phantom limitation, imposed solely by the defendant's own bargaining posture, were sufficient to justify application of Rule 23(b)(1)(B), as the court below held it is, then *every* settlement of class claims for money damages would be eligible for treatment not only under Rule 23(b)(3) but also under the more lenient and less protective Rule 23(b)(1)(B), which lacks both a predominance requirement and a guaranteed opt-out opportunity.

Outside the bankruptcy context—which is a product of legislative, not judicial, action, and which is not present here—substantive tort law does not furnish an Article III court with the power to effect such a pro-rata reduction of *in personam* claims for damages against a defendant in order to provide relief for late-arriving claimants. Federal courts, however well intentioned, cannot use a rule of civil procedure to fashion such relief in the interest of what they deem superior public policy. "Federal courts are not roving engines of justice careening about the land in search of wrongs to right." App. 153a-154a (Smith, J., dissenting).

Indeed, this settlement class is "a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief." *Keene Corp. v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993). In *Keene* the Second Circuit rejected an effort by an insolvent asbestos defendant to impose a mandatory class settlement upon future asbestos victims as a substitute for the substantive and procedural safeguards of bankruptcy.[9] The Second Circuit emphasized that

---

[9] To be sure, the nominal arrangement of the parties in *Keene* was superficially different. But as Judge Smith pointed out, that difference reflects no more than the fact that Keene was more forthright than Fibreboard:

> Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement.

App.108a.

making pro-rata adjustments of tort creditors' rights is not a task for the federal judiciary, even if the class action procedure might be "more efficient" than bankruptcy: "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." 14 F.3d at 733.[10]

Although the Fifth Circuit grudgingly accepted the bare proposition that the Bankruptcy Code governs the distribution of the assets of a company beset by more creditor demands than it can satisfy (App. 76a), the court nevertheless undertook a review of the Code and concluded that it could do a better job. App. 74a-80a. The panel majority criticized the supposedly "weak and uncertain position afforded future tort claimants under the Bankruptcy Code" (App. 79a) and held that Congress's statutory scheme was "inferior[] to a 23(b)(1)(B) class action in the instant case." App. 74a. Citing 11 U.S.C. § 305(a)(1), the court concluded, in conflict with the Second Circuit in *Keene*, that Congress actually *intended* that "the terms and principles of the Bankruptcy Code would be circumvented" whenever a federal court and settling parties concocted their own "superior methods of asset distribution." App. 78a.

But Congress neither enacted nor intended any such delegation to Article III judges and private litigants of the quintessentially legislative power exercised by the courts below. Section 305(a)(1) merely allows a federal court to dismiss or suspend a bankruptcy proceeding "if an arrangement is being worked out by creditors and the debtor out of court." H.R.Rep. No. 595, 95th Cong., 1st Sess. 325 (1977). It is an *abstention* provision designed to promote voluntary private ordering by economic actors. It is *not* a grant of *authority*—

---

[10] The *Keene* court warned that

> class members in cases such as this would have no say in the conduct of the court-appointed class representatives and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.

14 F.3d . at 732.

and *lawmaking* authority at that—to the federal judiciary to ignore Article III and the Rules Enabling and Decisions Acts, and to circumvent the Bankruptcy Code, by using Rule 23 to enact its own solutions that prospectively alter substantive state-law rights—here, the state-law rights of unknowing, unidentified, unconsenting tort victims. That federal legislative power is reserved to Congress.

Indeed, in the Bankruptcy Reform Act of 1994 Congress enacted special legislative relief for insolvent defendants subject to present and future asbestos-related liabilities. *See* 11 U.S.C. §§ 524(g) & (h).[11] The Fifth Circuit's eagerness to usurp the role of legislative understudy notwithstanding, the actor legitimately cast in that role has already taken the stage, and there is no room for black-robed interlopers. *Cf. Mistretta v. United States*, 488 U.S. 361, 427 (1989)(Scalia, J., dissenting).

The decision below thus raises one of the fundamental problems that concerned this Court in *Amchem*, but that the resolution of *Amchem* on Rule 23 grounds made it unnecessary for the Court to reach. As Justice Kennedy put it during the argument of that case:

> If I were the district judge, I'd say, this is marvelously superior, but that is a substantive determination that you are going to displace existing law with a new, different, substantive regime, and I don't think the rules allow you to do that.

Tr. Oral Arg. 10-11. Making and imposing such substantive choices manifestly "exceeds the authority of the courts under the rule. ... [it] is the basis for legislation." Tr. Oral Arg. 22 (Kennedy, J.). *See also id.* at 23-24, 56-57. This restructuring of class members' substantive state-law rights was not merely an incidental by-product of the district court's class certification here—*it was the express purpose of this class action*. The Fifth Circuit's purposeful arrogation of legislative authority warrants the plenary attention of this Court.

---

[11] These provisions allow asbestos defendants in Chapter 11 proceedings to set up a trust and enjoin even future plaintiffs from suing the defendant, thus redirecting future asbestos personal injury claims from the defendant to the trust.

III. DUE PROCESS REQUIRES THAT CLASS MEMBERS IN THIS ACTION, WHO PLEADED EXCLUSIVELY PERSONAL INJURY CLAIMS FOR MONETARY DAMAGES, BE GIVEN THE OPPORTUNITY TO EXCLUDE THEMSELVES FROM THE CLASS.

A writ of certiorari was granted by this Court in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (per curiam), to decide whether due process requires that all class members be given the opportunity to exclude themselves from any class action purporting to bind them with respect to their *in personam* claims for damages. 511 U.S. at 120-21. Although the procedural posture of that case frustrated the Court's resolution of that question, the Court was unanimous that the question would warrant the Court's attention when properly raised in a future case. *See id.* at 125 (O'Connor, J., joined by the Chief Justice and Kennedy, J., dissenting) (this constitutional issue is "important enough to warrant review").

Just last Term, in *Adams v. Robertson*, 117 S.Ct. 1028 (1997) (per curiam), this Court again granted certiorari to decide "whether the certification and settlement of this class action suit (which petitioners characterize as primarily involving claims for monetary relief) violated the Due Process Clause ... because the class members were not afforded the right to opt out of the class or the settlement." *Id.* at 1029. Although the Court once again had to dismiss the writ as improvidently granted (because the issue had not been properly preserved), the Court unanimously reaffirmed its "continuing interest" in that question. *Id.* at 1032 n. 6.

No such obstacles to plenary consideration exist here: this due process question was pressed by the petitioners and expressly ruled upon below. App. 81a-85a. *See also* App. 119a-133a (Smith, J., dissenting). This would appear to be the case that the Court has been looking for. Indeed, the issue is even more ripe for resolution now because the decision below creates a conflict with the Ninth Circuit's decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994). *See* App. 120a n. 16 (Smith, J., dissenting).

The petitioners here are objectors to the class settlement who contend that the courts below erred in relying on the settlement (and on Fibreboard's then-pending insurance dispute) to recast the plaintiff class's claims for individual damages as claims for equitable

relief that qualify for mandatory class treatment. The Fifth Circuit rejected petitioners' due process objections to the mandatory nature of this class on the grounds that class members were not *really* seeking damages, but were instead seeking equitable distribution of a common fund. App. 81a-83a. Yet, as Judge Smith pointed out, *the panel majority expressly conceded that the complaint itself belies this characterization*, because the "'central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages.'" App. 156a (quoting the panel majority at App. 58a). Likewise, the district court "actually stated that '[the] claims were, prior to the settlement, *in personam* in character.'" App. 156a n. 56 (quoting the district court at App. 518a).

The Fifth Circuit's attempt to wedge its holding under the authority of other cases involving mandatory classes (App. 84a) is doomed to failure because those were bankruptcy cases where the underlying rights of the class members *were already limited* to a pro-rata distribution of a *res* created by bankruptcy proceedings *before the class actions were initiated*. *See In re Joint E. & S. Dist. Asbestos Litig. (Findley I)*, 982 F.2d 721, 735 (2d Cir. 1992) (Rule 23(b)(1)(B) mandatory class action is appropriate where parties seek equitable distribution of pre-existing bankruptcy trust fund); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir. 1996) (Rule 23(b)(1)(B) may be used if case "is not an action for money damages but is rather an action in equity for the restructuring of the Trust" already established pursuant to the statutory authority of a bankruptcy court in same jurisdiction).

As shown in Part II *supra*, no such previously existing *res* or "limited fund" is at issue here. Prior to the negotiation of this settlement, Fibreboard faced "a liability that theretofore had been, quite literally, limitless." App.11a (Smith, J., dissenting). Only the district court's use of a *procedural* rule, 23(b)(1)(B), purports to have substantively transformed class members' individual *in personam* claims into an equitable, unitary, *in rem* claim against a phantom "common fund" created by the settlement of that very same class action. Before this judicial alchemy was performed, the class members possessed, and pleaded, only personal injury damages claims—precisely the kind of individual claims that occupy the zenith of what this Court has unanimously described as "our 'deep-

rooted historic tradition that everyone should have his own day in court.'" *Richards v. Jefferson County*, 116 S.Ct. 1761,1766 (1996).

To be sure, even *in personam* claims such as the class members' state law tort claims against Fibreboard can, in special circumstances, be reduced, consistent with due process and federalism, to *in rem* claims to a pro-rata share of a limited fund. But such federal alteration of *substantive* state law rights can only be accomplished pursuant to *congressional authorization*. *See Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("The Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, § 8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro-rata share of the *res*.").

The second due process issue raised by the certification of a mandatory, nationwide diversity class action in this case is the narrower question of whether the district court in Texas "may exercise jurisdiction over the claim of [an out-of-state] class-action plaintiff," and "bind" him "concerning a claim for money damages" without affording him "an opportunity to remove himself from the class," even though "that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). That question too is properly presented here because several of the objectors are non-residents who lack minimum contacts with the forum state of Texas.[12]

As Judge Smith noted (App. 120a & n.16), on this issue the decision below is in direct conflict with the holdings of other circuits. *See In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768-69 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). *Cf. In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992) (upholding 23(b)(1)(B) class action seeking equitable redistribution of a pre-existing bankruptcy trust, but recognizing that "applicable standards for personal jurisdiction" under *Shutts* would forbid mandatory class treatment if members of the plaintiff class were not already beneficiaries of the trust).

---

[12] Petitioners Allgood, Evers and Taylor are Alabama residents who lack even minimum contacts with Texas. Petitioners Ortiz and Cochran reside in the forum state of Texas and therefore present the broader due process question of whether all class members must be given a chance to opt out.

This case thus presents significant due process issues regarding the rights of individuals to control their own claims for damages and to choose whether to be bound by a court in a distant forum. These due process issues, which have been of continuing interest to this Court and have created a split in the circuits, provide an independent and compelling basis for this Court to grant certiorari.

IV. THIS COURT RECOGNIZED IN *AMCHEM* THAT THE NOTICE QUESTION PRESENTED HERE IS OF GRAVE IMPORTANCE.

In *Amchem* this Court stated that inherent impediments to adequate notice "rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement." 117 S.Ct. at 2252. Although *Amchem* involved a Rule 23(b)(3) class, for which notice is mandated by Rule 23(c)(2), the Court relied in its notice analysis on the dissenting opinion of Judge Smith in this case, which involves a Rule 23(b)(1)(B) class, for which notice is mandated by Rule 23(e). 117 S.Ct. at 2252 (citing App. 113a-118a). The Court observed that many class members "may not even know of their exposure [to asbestos], or realize the extent of the harm they may incur." 117 S.Ct. at 2252. And, "[e]ven if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently," whether to accept or object to the settlement. *Id.* Although this Court did not "rule, definitively, on the notice given" in *Amchem*, six Justices "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." 117 S.Ct. at 2252. Because the notice problems are identical here, this question too merits the Court's plenary review.

V. THIS CLASS ACTION IS NOT A JUSTICIABLE CONTROVERSY UNDER ARTICLE III.

The decision below endorses the use of federal judicial power to enact a prospective change in the state law rights of unconsenting, unknowing, potential future asbestos tort victims who have no injuries and no ripe legal claims. It is hard to avoid the conclusion

of Judge Smith, dissenting below, that "[t]his case shatters the constitutional limits placed on the authority of the federal courts by Article III." App. 155a. "When we depart from th[e] role" of resolving actual cases and controversies by accepting proposals for "private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges." *Id.* at 154a. These same justiciability questions were presented in *Amchem* and occupied a considerable part of the oral argument.[13] Although the Court pretermitted them in *Amchem* by ruling that certification of the class was error in any event, the Court confirmed the importance of these questions by noting that, if certification were arguably permissible, "the jurisdictional issues would loom larger." 117 S.Ct. at 2244 n. 15.

A. This "class action" is a feigned proceeding.

Fibreboard wanted to redirect and limit the entirety of its future asbestos tort liability to its remaining insurance policies, so it solicited several cooperative plaintiffs' lawyers to arrange a global settlement. *See* page 1-3 *supra*; App. 41a. The district court judge choreographed the ensuing "proceeding." The court below found that, as an adjunct to lawsuits already pending in the federal district court in Eastern Texas between Fibreboard and its insurers over the terms of the insurance policies (App. 40a, 42a), Judge Parker directed class counsel and Fibreboard to work together on—to "negotiate"—a new lawsuit, which the district court described as "a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." App. 45a. Those negotiations did not involve the resolution of *existing* legal claims for *actual* injuries, but the establishment of an elaborate alternative dispute resolution regime to take control of any and all *future* asbestos claims against Fibreboard.

---

[13] For example, Justice Scalia suggested that there is no "case or controversy" when parties cooperatively engage a court's jurisdiction simply to embrace a settlement they've already agreed upon. Tr. Oral Arg. in *Amchem Products v. Windsor*, No. 96-270, at 25-26. Justice Kennedy suggested that such a collaborative effort to have a federal court enact an alternative dispute resolution scheme "exceeds the bounds of case or controversy." *Id.* at 24-25. And Justice Ginsburg expressed doubts about the propriety of a federal district court "creating this vast exposure-only litigation that never existed." *Id.* at 20.

Of course, those plaintiffs who had been exposed to Fibreboard's asbestos but had not yet experienced injury (the vast majority of the class) could not predicate federal jurisdiction on claims for future lung cancers or other injuries that hadn't yet occurred, because such unripe claims would lack any present injury. So the class of "exposure-only" future plaintiffs pleaded only claims for "fear of cancer," "enhanced risk of developing cancer," and "damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease." App. 222a.

Remarkably, the district court conceded that those pleadings were a *pretext*: "This action was filed to obtain judicial approval of a class settlement which ... will resolve all *future* asbestos-related personal injury claims against Fibreboard." App. 183a (emphasis added). The Fifth Circuit likewise admitted that the parties "clearly did not intend to litigate the complaint." App. 86a. It therefore comes as no surprise that the settlement ADR process does not redress *any* of the claims pleaded in the complaint: there are no damages for "risk" of cancer, no subsidies for "medical monitoring" or psychotherapy for "fear" of cancer. App. 104a (Smith, J., dissenting). Therefore, the "*only* reason" to plead those claims in the complaint "was to manufacture jurisdiction over class members who have not yet manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury." *Id.* at 104a-105a.

This is an open-and-shut case: it fails the requirements of Article III. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1019 (1998). The filing of the complaint was orchestrated by the settling parties solely as part of their joint effort to foist their negotiated tort reform proposal upon the class. Article III jurisdiction may not rest upon such a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905).

Worse still, the district court itself participated in this charade. Just last Term, in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), this Court unanimously rebuked the Ninth Circuit for offering "suggestions" and "instructions" to friendly parties on how to "place" an issue before a federal court in a way that superficially appeared to be a justiciable controversy. 117 S.Ct. at 1065 & n.15.

The parties here likewise "took the steps the [federal court] prescribed" in order to sustain the pretense of a justiciable controversy. 117 S.Ct. at 1070. And the constitutional vice was the same: "In advancing cooperation between" the parties on the framing of the proceeding for submission to a federal court, the courts below "did not home in on the federal courts' lack of authority to act in friendly or feigned proceedings." 117 S.Ct. at 1070 (citing *United States v. Johnson,* 319 U.S. 302, 304 (1943)).

If anything, the abuse in this case is greater than that condemned by this Court in *Arizonans*. Here it was not just a question of rigging the appeal posture to resurrect the justiciability of a once-live legal dispute. In this case, there was no justiciable controversy at any time. This "case" is a legislative joint venture, not an adversarial lawsuit. A writ of certiorari is in order.

B. The "exposure-only" class members have no injury in fact.

To establish standing under Article III, a litigant must demonstrate that he has suffered an "injury in fact": "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But here virtually the entire plaintiff class consists of people who have been exposed to asbestos but who have no actual injuries. They allege no disease, no physical impairment, just "risk" or "fear" of *future* injuries. App. 222a.

But allegations of "fear" and "risk" of developing an asbestos-related illness in the future are "'unadorned speculation' insufficient to invoke the federal judicial power." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Id.* As the dissent explained in great detail below (App. 154a-180a), the vast majority of the exposure-only class members in this diversity suit cannot show "an invasion of a *legally protected interest,*" *Lujan*, 504 U.S. at 560 (emphasis added), sufficient to confer standing, because the substantive tort law of most states affords no cause of action for mere exposure to a toxin. As Justice Ginsburg pointed out during the *Amchem* argument while noting that at least 35 states recognize no such cause of action for future illness, these theoretical future

plaintiffs "do not have a claim for relief because they haven't been injured yet." Tr. Oral Arg. 57-58.

This Court has unanimously held that the question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Therefore, "when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." App. 178a (Smith, J., dissenting). The question is not whether the plaintiff will win on the merits of his cause of action, but whether it is even arguable that such a cause of action even *exists* under the substantive law of the governing jurisdiction, and thus whether the plaintiff's allegations of injury, in the context of that cause of action, satisfy Article III.

A federal court has no jurisdiction if the plaintiff's "claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Steel Co. v. Citizens*, 118 S.Ct. at 1010. The "Article III requirement of remediable injury in fact" is not fulfilled where the plaintiff pleads only "entirely frivolous claims." *Id.* at 1013 n.2. Therefore, in the case at hand, "[a]ny claims not authorized by state law should have been explicitly excised" from the class complaint because the district court lacked jurisdiction over them under Art. III. App. 180a (Smith, J., dissenting).

Strict enforcement of the "actual injury" requirement is essential because it is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 116 S.Ct. 2174, 2179 (1996). The courts below forsook this principle, venturing instead into the legislative domain. And Article III standing requirements have a federalism dimension as well: they are "'a part of the basic charter ... providing for the interaction between the [federal] government and the governments of the several states.'" *Spencer v. Kemna*, 118 S.Ct. 978, 985 (1998) (ellipsis and brackets in original). The Fifth Circuit's legislative adventures thus invade the prerogatives of both Congress and the States and warrant the plenary attention of this Court.

CONCLUSION

As Judge Smith recognized, the outcome of this case will have a profound impact on our system of federalism and on the legal rights of tort victims throughout the nation:

> Ever since the district court's certification order, ... corporate America has been "anxiously awaiting" a decision in this case. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims."

App. 101a. Although the refusal of the court below to abide by the law as announced in *Amchem* may seem unique in the degree of its insubordination, it will not remain so for long if this Court leaves the Fifth Circuit's decision unreviewed. Nor will other courts of appeals have an opportunity to rule on these questions in other cases. For by their very nature, nationwide settlement class actions can be filed anywhere in the country, and this case enshrines the Fifth Circuit as the venue of choice for mass tort defendants seeking judicially legislated tort "reforms" that abrogate state-law rights and resolve all of a defendant's future liabilities in a single stroke. Letting these issues percolate in the lower federal courts would shed no new light on this already critical problem. A writ of certiorari should issue now.

Respectfully submitted,

FREDERICK M. BARON
BRENT M. ROSENTHAL
STEVE BAUGHMAN
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Dallas, TX 75219
(214) 521-3605

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Counsel for Petitioners

April 16, 1998